SUPREME COURT, U. S.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 512

LEIGH T. BOWIE, et al., *Petitioners,*

v.

BOARD OF COUNTY COMMISSIONERS OF HOWARD COUNTY, et al., *Respondents.*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Statement

This is a zoning case that involves the rezoning from residential to industrial use of a tract of land in Howard County, Maryland. The land is near the New City of Columbia, Maryland, in the Baltimore-Washington corridor. The facts are fully stated in the opinions of the lower courts, and accordingly we here merely summarize the most salient aspects of the litigation.

The purpose of the rezoning was to permit General Electric Company to construct and operate a major facility that would employ some 12,000 persons. The interest of the corporate respondents in securing the establishment of that facility arose from their position as the developers of the New City of Columbia, Maryland, which is situated

near the area in question. Petitioners are three landowners who reside near the boundary of the tract.[1]

Under Maryland law, the rezoning could have been secured either on the standards applicable to what are termed floating zones or on the basis of a mistake in the original zoning or a significant change in the character of the area. The corporate respondents in their application made the necessary allegations both with respect to floating zones and with respect to change (Petition of the Howard Research and Development Corp., JOINT RECORD EXTRACT, p. 303, para. 9). At the hearing, evidence was introduced both with respect to floating zones and with respect to change and mistake (See opinion of the Court of Appeals, Pet. App. A, pp. 4-5; 11-12; 14; and see JOINT RECORD EXTRACT pp. 325, 376, 399-401). Petitioners appeared at the hearing, were represented by counsel, and testified (Pet. App B, pp. 21-22). The zoning board granted the application, finding that the rezoning would serve the public interest, would be compatible with the County's comprehensive plan of development, and would not adversely affect surrounding properties.

Petitioners appealed the determination to the Circuit Court. That court, at a preliminary conference, stated that it would hear any evidence that the parties wished to introduce, and gave the parties 25 days to assemble such evidence (Pet. App. A, p. 8; Pet. App. B, pp. 30-31). Petitioners, however, did not take advantage of that offer (Pet. App. B, pp. 30-31). The court thereupon issued its decision upholding the rezoning. The court held that the necessary requirements for establishment of a floating zone had not been met, but that the evidence did show that there had been both a mistake in the original zoning and a change in the character of the property (Pet. App. B, p. 28). Al-

[1] Petitioners did not introduce any expert evidence that the value of their property would be diminished by the rezoning and the Board of County Commissioners specifically found that the properties surrounding the tract would not be adversely affected (Pet. App. J, p. 79, para. (g)).

though the board had not explicitly made a determination respecting change, mistake, or floating zone, the court said that the board apparently had concluded that the floating zone requirements had been met; but the court relied on the principle that the reviewing court could affirm on any appropriate ground as long as that ground was supported by the record (Pet. App. B, pp. 25, 28).

On appeal, the Maryland Court of Appeals affirmed. In response to the contention that the Circuit Court had exceeded its jurisdiction in finding mistake and change, the Court of Appeals observed that the principle relied upon by the Circuit Court respecting review of zoning board determinations was firmly established by prior state court decisions. The Court of Appeals also noted that petitioners had had a full opportunity to introduce evidence respecting these issues both before the board and before the lower court, and that indeed they had assigned in the specifications of errors the alleged absence of evidence supporting findings of mistake and change. (Pet. App. A, p. 14).

Moreover, the Court of Appeals specifically adopted the view of the lower court respecting the strength of the evidence of change and mistake. As to mistake, the land had at the time of the original zoning been scarred by two large gravel operations and had been used hardly at all for residential dwellings (Pet. App. A, p. 12). As to change, the area was in the process of being laced with major highway arteries and rail trackage, and large related tracts had already been rezoned (Pet. App. A, p. 11).

On these facts, petitioners maintain that they have been deprived of due process of law within the meaning of the Fourteenth Amendment to the United States Constitution.

Argument

The petition should be denied because it raises no federal question of general importance. Indeed, it raises no substantial federal question at all.

1. Petitioners "ground" their petition "squarely on the principle embodied in *Saunders* v. *Shaw*," 244 U.S. 317. In so doing, they correctly identify the line of decisions relevant to their petition, but at the same time they betray the utter want of merit of their position. *Saunders* involved an attack on the application of a drainage tax to certain land. The landowners testified that their land would not be benefited by the drainage improvements. The trial court sustained the bondholder's objection to this evidence on the ground that benefit *vel non* was an irrelevant issue. The bondholder, relying on this ruling, did not offer certain evidence showing that the land would in fact be benefited. On appeal, the appellate court held the factual question to be relevant and decided the case, without remand, against the bondholder on the one-sided evidence in the record of no benefit. This Court held such action to be a denial of due process since the failure to remand, in view of the bondholder's proper reliance on the ruling of the trial court, resulted in the case being decided against the bondholder without his ever having had an opportunity to present his evidence.

Thus, *Saunders* stands squarely in the long line of decisions of this Court holding that, under the Fourteenth Amendment, persons engaged in adversary proceedings are entitled to notice and an opportunity to be heard. But until their petition in this Court petitioners did not suggest that the case raised a *Saunders* issue, and for very good reason: *Saunders* has nothing whatsoever to do with this case. As this Court pointed out in *Helis* v. *Ward*, 308 U.S. 365, 369, the mere fact that a higher reviewing authority decides a matter without remand on a theory different from that upon which the lower body acted does not, without more, bring the case within the *Saunders* rule. In the case at bar, as we have indicated, the initial rezoning application rested in part on allegations of change. Moreover, evidence respecting both change and mistake was intro-

duced at the hearing. Petitioners, represented by counsel, participated in the hearing; did not object to the introduction of that evidence; and did not introduce counter-evidence. No ruling was made that could in any way have led petitioners to believe they could refrain from putting in any evidence they might have had as to change and mistake. Petitioners then raised in Circuit Court the question of the weight of the evidence respecting change and mistake, but did not offer any evidence of their own even when given 25 days by the court to prepare such evidence. Having been afforded not one, but two chances to adduce evidence respecting the issues of change and mistake, petitioners surely are in no position to claim that the Fourteenth Amendment entitles them to yet a third chance.

2. Petitioners also complain about the Maryland procedure under which, as they put it, on review of a zoning board determination the "reviewing Court supplies the findings and conclusions to uphold the Board's Order and affirms without remand to the Board . . ." (Pet. p. 2). But that complaint, too, founders upon the fact that petitioners were not in any way deprived of the opportunity to make their case. It is established that the Fourteenth Amendment does not require that the states establish any particular form of proceeding, as long as they provide a proceeding that secures to the parties the essential right to be heard. *Insurance Co.* v. *Glidden Co.*, 284 U.S. 151, 158; *Holmes* v. *Conway*, 241 U.S. 624, 631-34; *Louisville & Nashville R.R.* v. *Schmidt*, 177 U.S. 230. In this case that right was fully afforded, as we have indicated, not only at the administrative level but also at the judicial review level.[2]

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[2] *Cf.* this Court's decisions indicating that a state need not even provide a right of appeal if fair procedures are brought into play at the initial hearing level. *Dohany* v. *Rogers*, 281 U.S. 362, 369; *Ohio* v. *Akron Park District*, 281 U.S. 74, 80; *Reetz* v. *Michigan*, 188 U.S. 505; *District of Columbia* v. *Clawans*, 300 U.S. 617, 627; *Griffin* v. *Illinois*, 351 U.S. 12, 18.

In such circumstances, the state is entitled to prescribe standards for judicial review under which the decisions of the zoning boards are not to be disturbed unless unsupportable on any ground sustained by the facts. Such an approach to judicial review, it may be noted, is particularly appropriate where under state law the reviewing court is empowered to take evidence [3] and where the issue relates to zoning classifications, which are basically legislative in character [4] and as to which this Court has said:

> ". . . If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control." *Euclid* v. *Ambler Co.*, 272 U.S. 365, 388.

3. Petitioners suggest that they were given too speedy a trial (Pet. pp. 16-17). As the Court of Appeals observed, delay was doubtless to petitioners' advantage, but they were given wholly adequate notice (Pet. App. A, pp. 14-15). In that connection, petitioners say that they did not, by one day, get the 15 days notice of the zoning board hearing required by state law (Pet. p. 11). But—assuming contrary to fact that such a breach of state law would also breach the Fourteenth Amendment—petitioners did in fact get proper notice, as both the Court of Appeals and the Circuit Court said (Pet. App. A, pp. 3-4; Pet. App. B, p. 30).

4. Petitioners assert that the Board did not follow its own regulations (Pet. p. 15). We are unable to tell from the petition exactly what default is charged in that regard. The Board fully complied with its regulations. Moreover, petitioners do not assert any prejudice. In any event, this

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[3] As to this authority of the court, in addition to the case at bar see *Mayor and City Council of Baltimore* v. *Shapiro*, 187 Md. 593, 51 A.2d 269 (1947).

[4] See *Hyson* v. *Montgomery County Council*, 242 Md. 55, 217 A.2d 578, 583 (1966), and cases there cited.

issue was not raised in the Circuit Court (See Bill of Complaint, JOINT RECORD EXTRACT pp. 2-6), and accordingly was one of many peripheral matters that the Court of Appeals did not feel obliged to consider (Pet. App. A, pp. 16-17).

5. Finally, petitioners suggest without specification that the provision establishing the procedure under which the zoning application was filed, Section 14A, was itself unconstitutional (Pet. p. 14). That claim was made for the first time in the Court of Appeals, which therefore refused to consider it. Accordingly, it is not properly before this Court.

Conclusion

This is simply a zoning case. The decision turned on the particular facts of the case and on the application of state law. No federal question is before this Court—substantial or otherwise. Petitioners merely want this Court to act as an additional appellate court so that they may have yet a third judicial review of a county rezoning action.

The writ should not issue.

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